APPENDIX A.

Opinion of the Court of Appeals (R. 19-37).

United States Court of Appeals
For the Eighth Circuit.

No. 17,810.

Independent Stave Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent.	On Petition for Review and Cross-Petition for Enforcement of An Order of the National Labor Relations Board.

[November 10, 1965.]

Before Johnsen, Vogel and Matthes, Circuit Judges.

Vogel, Circuit Judge.

Independent Stave Company, Inc., petitioner herein, asks this court to review and set aside an order of the National Labor Relations Board (hereafter Board), respondent, issued on August 25, 1964, following proceedings under § 10 of the National Labor Relations Act (hereafter Act), 29 U. S. C. A., §§ 151, et seq. The Board, in its answer to the petition, has requested enforcement of its order. The Board's decision and order are reported at 148 NLRB No. 49. No jurisdictional questions are involved.

The Board, adopting the Examiner's findings, conclusions and recommendations, held that the petitioner vio-

lated § 8 (a) (1) and (5)[1] of the Act by executing a collective bargaining agreement with Local 42 of the Coopers International Union of North America (hereafter Local 42) after refusing to bargain with Coopers International Union of North America (hereafter International). Local 42 was affiliated with International.

There was dispute in the evidence offered by the parties and heard by the Examiner. Different versions of what happened on various occasions were presented by the witnesses and inferences that could be drawn therefrom are conflicting. After evaluating the evidence, the Trial Examiner made findings as discussed below.

International was certified by the Board on September 15, 1955, as the representative of petitioner's employees involved herein. There was no subsequent certification of any other labor organization and ever since the certification International has been the duly certified collective bargaining representative of all employees in the unit. Since the certification in 1955 International has negotiated

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[1] 29 U. S. C. A., § 158, insofar as it may be pertinent herein, provides:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [dealing with the employees' right to self-organization and collective bargaining] of this title;

* * * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

Under § 159 (a)

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

with petitioner about wages, hours and working conditions of employees in the unit. Local 42 has participated in these negotiations.

On June 26, 1963, petitioner met with Local 42 officers and with George Calvert, Fourth Vice President of International, to negotiate a new contract. During that meeting Calvert was the principal spokesman for the employees. Proposals which Calvert and the officers of Local 42 had previously prepared and agreed upon were discussed with petitioner. No agreement was reached at this meeting.

A second bargaining session, at which Calvert and Gene Souders, attorney for International, were principal spokesmen for the employees, was held on July 11, 1963. James Boswell, petitioner's president, had been present at the meeting of June 26th but did not attend the July 11th meeting. Petitioner was represented at the latter meeting by Robert Donnelly, its attorney. Again discussion was had but no agreement was reached. At the conclusion of the second meeting it was agreed that the parties would meet again the next day but with the understanding that only non-monetary items would be discussed. The reason for this was that Donnelly claimed it would be necessary for him to take some time to consult with Boswell on monetary items and to compute the actual costs of the money items involved in the proposals.

On the morning of the scheduled meeting of July 12th, Local 42 officers met with Calvert and told him that they wanted to negotiate something less in the way of wage increases than had been proposed to petitioner in the earlier meetings. Such proposals had been previously submitted by Local 42 to International and rejected by the latter. After consulting with International's president by telephone, Calvert informed the Local 42 committee that he would not assist them in negotiating Local 42 proposals

and that he would not attend the meeting that morning. He asked that the petitioner be so advised.

The July 12th meeting was thus attended only by representatives of petitioner and by officers of Local 42. Dean Rhoten, president of Local 42, was the principal spokesman for the group. Rhoten told the petitioner's representatives that Calvert would not attend the meeting and that the local group was representing Local 42. Boswell asked where Calvert was and Rhoten advised him that there had been a disagreement between the local and International and that Calvert would not attend. He also added that the petitioner was not dealing with International but with Local 42 and Boswell responded that such an arrangement was "fine with him."

During the July 12th meeting petitioner made what it described as a "final offer" to the officers of Local 42. This offer covered monetary as well as non-monetary items. Negotiations continued all that day and resumed again on Saturday morning, July 13th. On Monday, July 15th, petitioner by letter gave Local 42 until July 18th to accept or reject its "final offer", which it stated would become "void" if not accepted before then. Attached to the letter was a copy of the offer. Petitioner did not send copies of the letter or the offer to International.

On July 16, 1963, James J. Doyle, President of International, sent the following telegram to James Boswell, petitioner's President, Robert Donnelly, petitioner's attorney, and Dean Rhoten, president of Local 42:

> "This is to advise under Sections 34 and 85 of Coopers International Constitution no collective bargaining agreement between Independent Stave and Local 42 can be entered into binding and effective until the terms first approved by majority of International Executive Board."

After Rhoten had received his copy of International's telegram he discussed it with Donnelly. Rhoten testified that

Donnelly "suggested that we go ahead and sign the contract because George Calvert had walked out, thought it would be legal for us to sign a contract, I'll put it that way, because Calvert walked out of the negotiations."

On July 18, 1963, Rhoten and other officers of Local 42 signed a labor contract with petitioner. The contract had been ratified by members of Local 42 on July 16, 1963, by a vote of 74 to 25. A space for Vice President Calvert's signature was included in the document but he at no time has executed his signature thereon.

After the contract had been executed petitioner asked the officers of Local 42 to present it to International. Rhoten presented the agreement to Calvert and to Ernest Higdon, First Vice President of International, on July 21st or July 22nd. This was the first time International officials were aware that a contract had been executed between Local 42 and petitioner. Calvert refused to sign the agreement in the space provided for his signature, saying that it was unacceptable to him but that he would forward it to International.

After receiving the agreement the executive board of International voted to reject it and Doyle, International's President, notified petitioner to that effect. His letter to petitioner is as follows:

"August 1, 1963

"Mr. J. E. Boswell, President
Independence [sic] Stave Company
Lebanon, Missouri

Dear Sir:

"Coopers International Union, AFL-CIO has noted the draft of collective bargaining agreement dated July 18, 1963, proposed for employees of your company. You are advised that Coopers International Union, AFL-CIO rejects the said draft agreement by

reason of sub-standard provisions thereof. The General Executive Board of Coopers International Union has refused to approve the draft agreement and the said draft agreement is null and void and of no binding effect upon Local 42 and Coopers International Union.

"Coopers International Union, AFL-CIO demands that your Company meet with its representatives for the purpose of resumption of negotiating for a collective bargaining agreement covering your employees."

Boswell directed Donnelly to reply to International's request for bargaining. Donnelly did so through the following letter, dated August 6, 1963:

"Mr. James J. Doyle, President
Coopers International Union
120 Boylston Street
Boston 16, Massachusetts

Dear Mr. Doyle:

"We have your letter of August 1, 1963, addressed to Mr. J. E. Boswell, President, Independent Stave Company, Lebanon, Missouri.

"On July 11, 1963, as representative of the Company, I met with Mr. George Calvert of your office, Mr. Gene Souders, his attorney, and with eight representatives of the local union, here at my office. After much discussion concerning a proposed new contract, and at Mr. Calvert's request, it was agreed that we would meet again at 10:00 A. M. the following morning, July 12, 1963, for further negotiations. At 9:15 A. M. on July 12, 1963, I called Mr. Calvert at the Munger Moss Motel here in Lebanon and requested that we meet at the Company offices rather than at my office. This was agreeable with Mr. Calvert. At 10:15 A. M. on July 12, 1963, Mr. Dean Rhoten, President

of the Local, appeared with four other men, and sat down with representatives of the Company, including the writer of this letter, at the conference table. The Company was then advised that Mr. Calvert refused to be present and a demand was made upon the Company that it negotiate with those present. Negotiation then proceeded on July 12, 1963, and on subsequent occasions, a tentative agreement was reached, and submitted to and approved by the men in the bargaining unit, and was signed on the 18th day of July, 1963.

"The Company considers the actions of Mr. Calvert outlined above a refusal to bargain, and, therefore, an unfair labor practice. Under the circumstances, we regard your demand that bargaining sessions be resumed as completely unreasonable."

The Examiner found that Calvert, in company with International's attorney, Souders, went to the petitioner's office on August 7, 1963, in an attempt to arrange a meeting with Boswell. They were told by petitioner's receptionist that Boswell could not see them that morning. They inquired if Boswell could see them that afternoon and were told that Boswell was busy that afternoon. They then asked if they could come back the following morning but were told that, "* * * Mr. Boswell will not see you at all." There is dispute with reference to the latter occurrence, but the petitioner's receptionist was not called as a witness and the Examiner's findings in connection with the incident are well substantiated in the record.[2]

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[2] As stated by the Trial Examiner:

"* * * Mr. Boswell also testified that the first knowledge he had of Calvert's and Souder's visit to his plant was when charges were filed against the [petitioner] and that he did not tell his receptionist he would not meet with the men. The receptionist was not called and no explanation was made of [petitioner's] failure to do so. As stated, I credit Calvert's account."

Clearly the failure by the petitioner to call its own employee lends credence to the position of International.

On or about August 5, 1963, International advised Dean Rhoten by telegram that Local 42 was placed under trusteeship effective immediately and that Vice President Calvert had been appointed trustee to administer the affairs of Local 42. On September 5, 1963, International filed a suit, through George Calvert as trustee of Local 42, in the Circuit Court of Laclede County, Missouri, against Rhoten, asking that the state court issue its decree enjoining and restraining the defendant from withholding from the plaintiff property of Local 42 of any kind or nature in his possession, custody or control to which plaintiff was entitled by virtue of his office as trustee of Local 42; from retaining or exercising possession, title, custody or control over any property of any kind or nature which is the property of said Local 42; and from interfering with, impeding, precluding or preventing plaintiff from exercising, fulfilling or executing the functions and duties of his office as trustee of said Local 42. Plaintiff asked the court to issue an order requiring the defendant to appear and show cause why a temporary injunction should not be granted. An order to show cause was so issued. A hearing commenced on September 24, 1963. At the conclusion of the hearing the court found the issues for defendant Rhoten and denied the injunction. On September 28, 1963, the petition in the state court suit was dismissed by the plaintiff without prejudice.

On the basis of the evidence referred to, the Trial Examiner concluded, in pertinent part:

> "4. At all times since September 15, 1955, [International] has been, and now is, the exclusive representative of the employees in the unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
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> "5. By refusing on July 18, August 6 and August 7, 1963, and all times thereafter, to bargain collectively

with [International] as the exclusive representative of its employees in the appropriate unit, [petitioner] has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

"6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act."

The Board issued the following order:

"Upon the basis of the foregoing findings of fact and conclusions of law, * * * Independent Stave Company, Inc., Lebanon, Missouri, its officers, agents, successors and assigns, shall:

"1. Cease and desist from:

"(a) Refusing to bargain collectively with [International] as the exclusive bargaining representative of its employees constituting the unit herein found to be appropriate for the purposes of collective bargaining.

"(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder.

"(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor or-

ganization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

"2. Take the following affirmative action which it is found will effectuate the policies of the Act:

"(a) Upon request bargain collectively with [International] as the exclusive representative of employees in the aforesaid appropriate unit, and if an understanding is reached embody such understanding in a signed agreement."

The order further required petitioner to post appropriate notices at its plant in Lebanon, Missouri.

The first of two contentions of error raised by petitioner is that:

"I. The Board's Finding That the Employer Failed to Bargain in Good Faith Is Not Supported by Substantial Evidence on the Record as a Whole:

"A. The Record as a Whole Clearly Demonstrates That the International Abandoned Its Status as Exclusive Bargaining Representative and That Local 42 Properly Bargained for the Employees.

"B. The Record as a Whole Clearly Demonstrates That Local 42 Had Both Actual and Apparent Authority to Negotiate an Agreement With the Employer."

After a thorough review of the entire record, we hold that the facts as found by the Examiner are fairly substantiated by the testimony. The Examiner's conclusions drawn therefrom are reasonable and proper. Clearly, this court, even if it were otherwise disposed, may not set aside the findings of the Board and deny enforcement of its orders on a difference of opinion basis. We must be

mindful of the Congressional admonition in 29 U. S. C. A., § 160 (e), that

> "* * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive * * *"

and of the manner in which that section has been interpreted. See: **N. L. R. B. v. Walton Mfg. Co.**, 1962, 369 U. S. 404, 405, 82 S. Ct. 853, 7 L. Ed. 2d 829; **Universal Camera Corp. v. N. L. R. B.**, 1951, 340 U. S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456; **N. L. R. B. v. Arkansas-Louisana Gas Co.**, 8 Cir., 1964, 333 F. 2d 790, 794-795; **N. L. R. B. v. Douglas & Lomason Co.**, 8 Cir., 1964, 333 F. 2d 510, 513.

As we have pointed out, International became the certified bargaining representative of this unit of petitioner's employees on September 15, 1955. The record indicates that negotiations for collective bargaining agreements were entered into by the petitioner with representatives of Local 42 and also with the representatives of International. In all prior instances, with the exception of the contract agreement of 1957, the agreements were signed or approved by International. The reasons for International failing to sign the 1957 agreement are not clearly disclosed in the record. However, International acquiesced in the 1957 agreement and accepted its portion of the dues collected pursuant to the contract provisions. It cannot be doubted that since 1955 International has been the Board certified bargaining agent for petitioner's employees as contemplated under 29 U. S. C. A., § 159, set out in f. n. 1, supra. The Supreme Court has left no doubt about the duty to bargain only with the certified representative. This duty is set out in **Medo Photo Supply Corp. v. N. L. R. B.**, 1944, 321 U. S. 678, 683-684, 64 S. Ct. 830, 88 L. Ed. 1007, 1011:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the

chosen representatives of his employees. The obligation being exclusive, see § 9 (a) of the Act. 29 U. S. C., § 159 (a), **it exacts 'the negative duty to treat with no other.' Labor Board v. Jones & Laughlin Corp.,** 301 U. S. 1, 44; and see **Virginia Ry. Co. v. System Federation,** 300 U. S. 515, 548-549. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated § 8 (1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

"That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in **J. I. Case Co. v. Labor Board,** 321 U. S. 332; cf. **Order of Railroad Telegraphers v. Railway Express Agency,** 321 U. S. 342; see also **National Licorice Co. v. Labor Board,** 309 U. S. 50, 359-361. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. **Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained,** as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by § 7 and a violation of § 8 (1) of the Act." (Emphasis supplied.)

Petitioner's employees have never revoked the designation of International as their bargaining agent. There has been no decertification.

The evidence fully justifies the conclusion that it was petitioner and not International who refused to bargain. The evidence does not fairly justify a conclusion that International "abandoned" its status as exclusive bargaining representative for petitioner's employees nor that, in the eyes of petitioner, Local 42 had either actual or apparent authority to negotiate any binding agreement. The petitioner, recognizing International's status as the sole bargaining agent, called Calvert on the morning of July 12, 1963, to notify him of a change in the meeting place for the scheduled negotiating session, which session, as pointed out earlier, Calvert did not attend. Officers of Local 42, on the other hand, were not personally notified of the change by petitioner. Petitioner was well aware of the disagreement over wage demands between Calvert and Local 42 as being the reason why Calvert did not attend the July 12th meeting, which, incidentally, was originally scheduled to deal only with non-monetary matters. Petitioner also ignored Doyle's telegram of July 16th calling attention to the fact that no binding agreement could be made with Local 42 unless or until the terms of such agreement were first approved by International. In spite of the warning, petitioner, two days later on July 18th, entered into the agreement now in question. Petitioner asked that the officers of Local 42 forward a copy thereof to International. The fact that the agreement contained a place for Calvert's signature is an indication that petitioner realized International had not abandoned its status as bargaining agent for petitioner's employees. Petitioner's attitude in this matter is further evidenced by its refusal to speak with the officers and representatives of International who visited petitioner's plant on August 7, 1963. The Examiner was thoroughly

justified in concluding that petitioner was refusing to bargain with the proper certified bargaining representative and therefore was in violation of the Act.

The situation here is much like that found in **Quaker State Oil Refining Corp. v. N. L. R. B.**, 3 Cir., 1959, 270 F. 2d 40, certiorari denied, 361 U. S. 917, 80 S. Ct. 261, 4 L. Ed. 2d 185. There the employer attempted to obtain a working arrangement directly with the local union, thus by-passing the Oil Workers International Union, which was the certified bargaining agent. The company had sent to its employees a letter which proposed a higher wage increase than that previously negotiated with the national union and which urged the employees to sign the agreement without the national union's approval. The court held that it was the clear duty of the employer to bargain with the certified representatives of the employees exclusively and that its failure to do so was a violation of § 8 (a) (1) and (5) of the Act. After passing on other matters involved in that case, the court said at page 46 of 270 F. 2d:

> "The company characterizes its conduct as trying to help the employees who signed the petitions to get the [proposed] contract signed. It excuses its letter by saying that it endeavored to have the employees first try to have the International Union sign the agreement and if they could not accomplish this, to have the local union officials sign it.
>
> 'There is sufficient in the proofs to substantiate the charge. **It is clearly the duty of the employer under Section 8 (a) (5), (1) of the Act to bargain collectively with the chosen representative of the employees exclusively. Medo Photo Supply Corp. v. N. L. R. B.**, 1944, 321 U. S. 678, 683-684, 64 S. Ct. 830, 88 L. Ed. 1007. The Board considered the company's representations that its only purpose was to dispose of the wage dispute and thus avoid any reason to

strike. It refused to accept them because, since the employees had not repudiated their representative, differences with the latter must be handled intra-union not through the employer. **While the relationship of the local union with its bargaining representative was not satisfactory, the company had no right to interfere with it as it did. In so doing it violated the Act.''** (Emphasis supplied.)

In the same manner the petitioner in the instant case interfered in the dispute between Local 42 and International, the certified bargaining agent, and it violated the Act in so doing.

Petitioner would attempt to draw support from the provisions of Section 85 of International's constitution which provides in part:

> ''Each local union shall have autonomy over its own affairs and shall make their own contracts governing the hours of labor, working conditions, and scale of wages to be paid in their class of work and in the use of the union label, **subject to the approval of the general executive board,** but under no circumstances shall the general executive board approve of a contract nor a local union sign a contract which is not approved by the general executive board that calls for a lower scale of wages or poorer working conditions than are received by other locals or locals in the vicinity or part of the country doing the same work.
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> * * * * * * * *
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> ''Local unions shall retain their right to negotiate their own contracts as heretofore, unless they deem otherwise, and if they so desire they may request the assistance of any member of the general executive board during contract negotiations, **provided, however, that the local unions' contract proposals have**

been approved by the general executive board.'' (Emphasis supplied.)

The petitioner interprets the foregoing as giving ''* * * the Local actual authority to negotiate an agreement with the Company''. This is a misinterpretation. The emphasized portions of the paragraphs relied on indicate clearly that the approval of the general executive board of International is an essential prerequisite to a final contract. Here petitioner knew that there was a dispute between Local 42 and International and, as pointed out in the **Quaker State Oil Refining Corp. case,** supra, an employer may not ignore these differences to the complete disregard of the certified bargaining agent. As indicated by the record and as known to petitioner, there was a long history of differing opinions between International and Local 42. In spite of this, petitioner's employees had not effected any decertification of International as their bargaining agent. If petitioner had in good faith believed that International failed to negotiate, its proper course of action would have been to file charges before the Board, rather than to have signed an illegal contract with Local 42 alone. See **N. L. R. B. v. Plumbers Union, etc.,** 2 Cir., 1962, 299 F.2d 497, 501, and cases cited therein.

Petitioner's second contention of error is that:

> ''II. The Board Erred in Failing to Admit Into Evidence and to Consider (1) the State Court Decision That the Local Had Authority to Negotiate, (2) the State Court Transcript, and (3) the Admission of the International That the Local Was the Collective Bargaining Representative of the Company's Employees.''

The state court action referred to was that mentioned earlier which was brought by George Calvert as trustee of Local 42 against Dean Rhoten in the Circuit Court of the County of Laclede, State of Missouri.

We think no error was committed in the rejection. § 10 (a) of the Act, 29 U. S. C. A. § 160, provides in part:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. **This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:** * * *." (Emphasis supplied.)

See, **N. L. R. B. v. Supreme Dyeing & Finishing Corp.**, 1 Cir., 1965, 340 F. 2d 493, 494, f. n. 1 (ignoring of prior determination by Rhode Island Department of Employment Security); **N. L. R. B. v. Pacific Intermountain Express Co.**, 8 Cir., 1955, 228 F. 2d 170, 176, certiorari denied, 351 U. S. 952, 76 S. Ct. 850, 100 L. Ed. 1476 (refusal to reopen record to show subsequent decision of state tribunal); **N. L. R. B. v. Bell Aircraft Corp.**, 2 Cir., 1953, 206 F. 2d 235, 237 (ignoring of prior arbitrator's award); **N. L. R. B. v. Monsanto Chemical Co.**, 8 Cir., 1953, 205 F. 2d 763, 764 (waiving by N. L. R. B. of its own procedural rules to obtain statutory jurisdiction of dispute); **N. L. R. B. v. International Union, etc.**, 7 Cir., 1952, 194 F. 2d 698, 702 (ignoring of prior action before a Wisconsin state agency) **N. L. R. B. v. Walt Disney Productions**, 9 Cir., 1944, 146 F. 2d 44, 48, certiorari denied, 324 U. S. 877, 65 S. Ct. 1025, 89 L. Ed. 1429 (arbitration policy of federal N. W. L. B. not binding on N. L. R. B.). Although there is no apparent authority for the proposition, it would logically follow that if the Board has exclusive jurisdiction where unfair labor practices are involved, it could ignore what transpired at another proceeding, such as the state court hearing herein involved, as well as the result of such other proceeding. It is also possible, however, that the state court transcript was actually viewed by the Board, since the Board received it in the rejected exhibit file and since it had to review the Trial Examiner's evidentiary rulings.

Even if there were some conceivable basis for the admission of the state court transcript for use in impeaching witnesses, etc.,[3] there was no prejudicial error to petitioner here. For one thing, the evidence against petitioner, as we have pointed out, was substantial even if we assume part of it would have been discredited by the admission of the state court transcript. See, **Bituminous Material & Supply Co. v. N. L. R. B.**, 8 Cir., 1960, 281 F. 2d 365, 369. Further, as pointed out by respondent, to the extent that the state court transcript showed that International had approved of what it viewed as sub-standard contracts between other locals and other employers, it is immaterial in light of the evidence herein that International had warned petitioner that it would not honor an agreement between petitioner and Local 42.

While International's letter of August 1, 1963, to petitioner took the position that the agreement of July 18, 1963, was "null and void", the Board saw fit to allow the relations with employees which had been established under the agreement and the rights which employees had acquired thereunder to stand. In ordering petitioner to cease and desist from performing or giving effect to the agreement and to engage in bargaining with International upon request, the Board added, as noted above, the following qualification or proviso:

> "* * * provided, however, that nothing herein shall require the [petitioner] to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the [petitioner] has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder".

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[3] Cf., **N. L. R. B. v. Dewey Portland Cement Co., etc.**, 10 Cir., 1964, 336 F. 2d 117, 119-120; **N. L. R. B. v. Burns**, 8 Cir., 1953, 207 F. 2d 434, 436-437.

The effect of this would seem to be that petitioner was required to bargain with International only as to conditions projectively, or from the date of the Board's order, and not retrospectively or in attempted reach backward at anything which had gone before.

In summary, then, we hold that International did not abdicate its power as the certified bargaining agent of the employees, nor did it give to Local 42 power to enter into a contract without its approval. We accordingly direct that an order be entered enforcing the Board's proposed order, but in doing so we make clear what is implicit in the order; i. e., that such order be prospective only, with no retrospective aspects. This means, of course, that International can at any time reopen the negotiations with petitioner notwithstanding the present existing agreement between petitioner and Local 42.

The Board's order will be enforced as interpreted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

1. *Recommended Order of the Trial Examiner (A. R. 227-230).*

Recommended Order.

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Independent Stave Company, Inc., Lebanon, Missouri, its officers agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees constituting the unit herein found to be appropriate for the purposes of collective bargaining.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of employees in the aforesaid appropriate unit, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its plant in Lebanon, Missouri, the notice attached hereto and marked Appendix.[8] Copies of said

[8] In the event that these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in

notice to be furnished by the Regional Director for the Seventeenth Region shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Seventeenth Region in writing within 20 days from the receipt of this Decision[9] and Recommended Order what steps it has taken to comply herewith.

Dated at Washington, D. C. May 8, 1964.

/s/ George J. Bott
George J. Bott,
Trial Examiner.

Appendix.

Notice to All Employees
Pursuant to
The Recommendations of a Trial Examiner.

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively in good faith with Coopers International Union of North America, AFL-CIO, as the exclusive representative of all employees

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the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "A Decision and Order."

[9] In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

in the bargaining unit described below with respect to rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed contract. The bargaining unit is:

All plant employees handling cooperage, excluding all green mill employees, office clerical employees, professional employees, watchmen, guards and supervisors as defined in the Act.

We Will Not in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

INDEPENDENT STAVE COMPANY, INC.
(Employer.)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1200 Rialto Building, 906 Grand Avenue, Kansas City, Missouri 64106 (Tel. No. Baltimore 1-7000 Ext. 731), if they have any question concerning this notice or compliance with its provisions.

2. *The Board's Order (A. R. 234-236).*

Order.

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the Board hereby adopts as its

order, the Order recommended by the Trial Examiner and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as well as the additional action set forth below in a new paragraph lettered 1 (b). The present paragraph 1 (b) in the Trial Examiner's Recommended Order shall be relettered 1 (c). The Respondent shall post the revised notice attached hereto as Appendix A.

1. Cease and desist from:

(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder.

Dated, Washington, D. C.
Aug 25, 1964.

.....
FRANK W. McCULLOUGH,
Chairman,

.....
JOHN H. FANNING,
Member,

.....
HOWARD JENKINS, JR.,
Member,

National Labor Relations Board.

(Seal)

Appendix A.

Notice to All Employees
Pursuant to
A Decision and Order

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively in good faith with Coopers International Union of North America, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed contract. The bargaining unit is:

> All plant employees handling cooperage, excluding all green mill employees, office clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

We Will Not perform or give effect to our agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require us to vary or abandon any wage, hour, seniority, or other substantive feature of our relations with our employees which we have established in the performance of this agreement, or to prejudice the assertion by employees of any rights they acquired thereunder.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a

labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

INDEPENDENT STAVE COMPANY, INC.,

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1200 Rialto Building, 906 Grand Avenue, Kansas City, Missouri 64106 (Tel. No. Baltimore 1-7000 Ext. 731), if they have any question concerning this notice or compliance with its provisions.

3. *Extract From Petition for Review, Filed September 18, 1964, in the Court of Appeals for the Eighth Circuit by Independent Stave Company, Inc., Petitioner Herein (R. 4).*

* * * * * * *

(15) The Board, at page 2 of its Decision and Order, orders that Petitioner:

"1. Cease and desist from:

"(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO; provided, however, that nothing herein shall require the Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the

assertion by the employees of any rights acquired thereunder."

This portion of the Decision and Order is ambiguous, misleading, and confusing in its application to the problem here involved. If, for example, Petitioner unilaterally cuts wages back to the wage scale in effect before the agreement of July 18, 1963, and negotiated from the lower scale, would it be guilty of a violation of the Order and Decision and of an unfair labor practice? The Board should not be allowed to void the agreement of July 18, 1963, and, at the same time to give the Union the benefit of the concessions made by Petitioner therein.

If the Board intends that Petitioner must commence bargaining, intends that the employees shall not be deprived of rights acquired under the agreement of July 18, 1963, and intends that the Union shall not be limited in its demands to the provisions established by performance of the agreement of July 18, 1963, then the Decision and Order is grossly unfair to the Petitioner and should be corrected.

* * * * * * * *

4. *The Board's Proposed Decree (R. 38).*

(Filed Nov. 22, 1965, Robert C. Tucker, Clerk.)

United States Court of Appeals for the Eighth Circuit.

Independent Stave Company, Inc., Petitioner, v. National Labor Relations Board, Respondent.	No. 17,810.

Decree (as proposed by Respondent).

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964, directed against Petitioner, its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

Dated:

5. *Petitioner's Objections to the Board's Proposed Decree (R. 41-43).*

November 24, 1965

Honorable Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
United States Court and Custom House
St. Louis, Missouri 63101

Re: Independent Stave Company, Inc. v. NLRB

No. 17,810

Dear Mr. Tucker:

In accordance with Rule 27 (1) of the Rules of this Court, we hereby present our objections, on behalf of Independent Stave Company, Inc., petitioner, to the proposed decree served upon us by the National Labor Relations Board in the above case under cover of its letter of November 18, 1965, and received by us November 22, 1965.

The proposed decree, in our opinion, is not in conformity with this Court's opinion, particularly pages 18 and 19 thereof, or with the authorities cited to the Court by the NLRB in its letter of May 14, 1965 to the Court responding to arguments of counsel and questions raised by the Court at the oral argument on May 10, 1965.

Our objections to the Board's proposed decree stem solely from paragraph 1 (b) of the Board's order and the related provisions of the Appendix A notice to be posted by the employer. Our objections are three-fold: (1) The Board's order is not limited to enjoining reliance on the July 18, 1963 agreement with the Local **for the purposes of forestalling collective bargaining with the International union.** See **J. I. Case Co. v. NLRB**, 321 U. S. 332, 340-42 (1944). For example, the employer may want to rely on

the effectiveness of that agreement as a defense to a prosecution under Section 302 of the Taft-Hartley Act, 29 U. S. C., § 186, for payment of dues which were checked off and paid to the union throughout this period. See 29 U. S. C., § 186 (c) (4). (2) The Board's order does not clearly require the employer only to bargain about present and future conditions of employment in accordance with the Court's opinion. Opinion, pp. 18-19. (3) The Board's order, if literally construed, precludes the employer from raising any defenses to any action or suit by an employee attempting to enforce his rights under the July 18, 1963 agreement. See **J. I. Case Co. v. NLRB**, 321 U. S. 332, 341-2 (1944).

We call the Court's attention to the statement in its opinion that "The effect of this [the proviso to paragraph 1 (b) of the Board's order] would seem to be that the petitioner was required to bargain with the International only as to conditions projectively, or from the date of the Board's order, and not retrospectively or in attempted reach backward at anything which had gone before." Opinion, pp. 18-19. The Board's proposed decree does not embody any direction in this respect.

In addition, the Supreme Court has modified an NLRB order almost identical to that proposed by the Board in this case, and the Court's discussion of the general principles involved in such a modification is relevant here:

> ". . . Questions of construction had better be ironed out before enforcement orders issued than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning.

It will occur often enough when every reasonable effort is made to avoid it. . . .'' **J. I. Case Co. v. NLRB**, 321 U. S. at 341, 88 L. ed. at 769 (1944).

The **J. I. Case Co.** decision was specifically cited by the Board in its letter of May 14, 1965, to this Court regarding its proposed paragraph 1 (b) of the instant order, yet the proposed decree does not reflect the modifications which the Supreme Court there imposed on a similar decree.

Petitioner's proposed decree does reflect both the modifications required by **J. I. Case Co.** and those required by the opinion of the Court in the present case. Five copies of petitioner's proposed decree are attached hereto. Three copies of this letter and petitioner's proposed decree have been sent to the NLRB as indicated below.

Very truly yours,

HUSCH, EPPENBERGER, DONOHUE, ELSON & CORNFELD,

By /s/ STEPHEN W. SKRAINKA,
STEPHEN W. SKRAINKA.

SWS:scg

Enclosures

cc: National Labor Relations Board
Office of the General Counsel
Attention: Marcel Mallet-Prevost, Esq. (2 copies)
Assistant General Counsel
Washington, D. C. 20570

cc: Mr. Hugh E. Sperry, Director (1 copy)
Seventeenth Region, National Labor Relations Board
1200 Rialto Building
906 Grand Avenue
Kansas City, Missouri 64106

6. *Proposed Decree of Petitioner (R. 39-40).*

(Filed November 26, 1965, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

Independent Stave Company, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
} No. 17,810.

Decree (as proposed by Petitioner).

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order as interpreted by this Court. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964, directed against petitioner, its officers, agents, successors and assigns be and hereby is modified by

(1) Substituting for paragraph 1 (b) of the Board's order the following:

(b) Performing or giving effect to its agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO, in order to forestall collective bargaining with said International Union with respect to conditions in effect on and after the date of this order; provided, however, that nothing herein shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which the Respondent has established in the performance of this agreement or to prejudice the assertion by the employees of any rights acquired thereunder or any defenses thereto by the Respondent;

(2) By substituting the following for the second paragraph of the notice constituting Appendix A of said order:

We Will Not perform or give effect to our agreement of July 18, 1963, with Local 42 of Coopers International Union of North America, AFL-CIO, in order to forestall collective bargaining with said International union about any present or future wages, hours or conditions of employment; provided, however, that nothing herein shall require us to vary or abandon any wage, hour, seniority or other substantive feature of our relations with our employees which we have established in the performance of this agreement, or to prejudice the assertion by employees of any rights they acquired thereunder or to prejudice the assertion by us of any defenses thereto;

and it is hereby further

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964,

directed against Petitioner, its officers, agents, successors, and assigns, as so modified, be enforced, and that Independent Stave Company, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board contained in said order as herein modified.

Dated:

7. *The Decree of the Court of Appeals (R. 44).*

(Filed in U. S. Court of Appeals, Dec. 15, 1965.)

United States Court of Appeals for the Eighth Circuit.

Independent Stave Company, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
} No.17810.

Decree.

Before: Johnsen, Vogel and Matthes, Circuit Judges.

This Cause came on to be heard upon the petition of Independent Stave Company, Inc., to review and set aside an order of the National Labor Relations Board issued against petitioner on August 25, 1964, and upon the cross-petition of the Board for enforcement of said order. The Court heard argument of respective counsel on May 10, 1965, and has considered the briefs and the transcript of record filed in this cause. On November 10, 1965, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed that the order of the National Labor Relations Board, dated August 25, 1964,

as interpreted by the Court of Appeals in its opinion dated November 10, 1965, directed against Petitioner, its officers, agents, successors, and assigns be enforced, and that Independent Stave Company, Inc., its officers, agents, successors, and assigns abide by and perform the direction of the Board in said order contained.

Dated: December 15, 1965.

APPENDIX C.

1. *Extracts From Petitioner's Brief Filed in the Court of Appeals on April 8, 1965, Showing That the First Question Presented Was Argued to That Court.*

Statement of the Case.

* * * * * * *

[10] The parties reached tentative agreement on the basis of the Company's offer, and the Local officers agreed to accept the offer but indicated their desire to submit it to the members of Local 42 for their approval (R. 127, 91 and see 142, 207).

Argument.

* * * * * * *

[47] B. **The Record as a Whole Clearly Demonstrates That Local 42 Had Both Actual and Apparent Authority to Negotiate an Agreement With the Employer.**

The record shows that the bargaining history, the conduct of the International, and the provisions of Section 85 of the International Constitution gave the Local authority and apparent authority to negotiate an agreement with the Company. It further shows, without contradiction, that no limitations on the Local's authority to negotiate were communicated to the Employer until after the nego-
[48] tiations were concluded, concessions were made, and agreement was reached. The International's telegram of July 16 merely confirmed the Local's authority to negotiate and, in any event, arrived after agreement had been reached and was therefore too late to work an effective repudiation of the Local's authority. The Board was, therefore, in error in concluding that the 1963 agreement was not binding on the International and that Employer had wrongfully refused to bargain.

The Trial Examiner's discussion of the authority and apparent authority of the Local contains numerous errors (R. 223-226). First, he ignores most of the evidence which establishes the authority, both actual and apparent, of the Local. Second, he misinterprets Section 85 of the International Constitution perhaps because he gives it only perfunctory treatment due to his conclusion that the provisions of the Constitution are "a purely internal union matter" which the Company cannot raise as a defense to a refusal to bargain charge (R. 224). Third, the Trial Examiner totally misinterprets the purpose, intention, and effect of the International's telegram of July 16 (R. 225). Fourth, the Trial Examiner erroneously equates the International's power to revoke the Local's authority during negotiations with a power to repudiate an agreement already negotiated by it merely because the agreement had not yet been ratified by the members of the Local, reduced to writing, and executed (R. 225). Finally, the Trial Examiner is palpably in error in holding that the International could properly reject the contract on August 1, 1963 and that it was then able to "reassert" its statutory right to bargain (R. 225). There can be no doubt that even if it had not abandoned its bargaining status completely and did retain the power to revoke authority it had delegated to the Local, it could no longer revoke that authority once the agreement had been ratified by the members and executed.

[49] The facts which have been discussed in detail in the preceding argument show that the International agreed that the Local should be the sole party to each of the collective bargaining agreements executed by the Company since the 1955 certification. These contracts further show that the Local, not the International, administered the contracts and processed grievances. Many other facts advanced in the estoppel and abandonment argument, above, indicate the actual authority and apparent authority of the Local as well. See, **Ingalls Shipbuilding Corp.**, 143

N. L. R. B. 712, 712-713 (1963), for a Board conclusion finding authority, estoppel and succession to bargaining status on similar facts.

In many cases the Board and the courts have held that apparent authority, established by facts similar to those in the case at bar, cannot be repudiated subsequent to the conclusion of negotiations and results in Union responsibility for the acts of those apparently authorized. E. g., **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, 123 N. L. R. B. 922 (1959); **International Union, U. A. W. (Maremont Automotive Products, Inc.)**, 134 N. L. R. B. 1337 (1961); **Sheetmetal Workers Union, Local 65, A. F. L.-C. I. O. (Inland Steel Products Company)**, 120 N. L. R. B. 1678 (1958); **The Texas Company**, 112 N. L. R. B. 169, 170 (1955); **International Longshoremen's Union (Sunset Line and Twine Company)**, 79 N. L. R. B. 1487 (1948); **McLeod v. Local 27, Paper Products Chauffeurs, I .B. T.**, 212 F. Supp. 57, 64 (E. D. N. Y. 1962); cf., **N. L. R. B. v. Local 815, I. B. T.**, 290 F. 2d 99, 104 (2d Cir. 1961), and see Section 2 (13) of the Act, 29 U. S. C., § 152 (13). The Trial Examiner recognizes this principle, but ignores the numerous uncontradicted facts compelling its application to the instant proceeding (R. 224).

* * * * * * *

]60] It is apparent, therefore, that, even if none of the other evidences of authority was considered, Section 85 alone created authority in the Local to negotiate the agreement and that no limitations on this authority was communicated to the Company, at least prior to July 16, 1963. Where restrictions on the Union negotiators' authority are not effectively communicated to the Company, the International cannot later repudiate the contract arrived at in negotiations with them. **International Union, U. A. W. (Maremont Automotive Products, Inc.)**, 134 N. L. R. B. 1337 (1961), **Sheetmetal Workers Union, Local 65, AFL-**

CIO (Inland Steel Products Company), 120 N. L. R. B. 1678 (1958). In the **Inland Steel Products** case, the Board held that restrictions in the bylaws of a local not communicated to the Company negotiators could not restrict the Union negotiators' authority. *Id.* at 1679.

* * * * * * * *

[64] The third point relied upon by the Trial Examiner to show that the Local's authority was revoked to the Company's knowledge prior to the execution of the agreement was the telegram sent by the International on July 16, 1963. This telegram was ineffective to serve that purpose for two reasons: (1) the telegram confirmed, rather than revoked, the Local's authority to negotiate, and (2) it was too late to revoke the Local's authority because tentative agreement, subject only to Local membership ratification, had already been reached.

* * * * * * * *

[65] Moreover, once the Company had made substantial concessions and reached tentative agreement with the Local officers subject only to the ratification by the mem-
[66] bers of Local 42, no notification by the International that the Local negotiators lacked authority could be effective to repudiate the agreement already reached. The International was bound by the contract subject only to the possibility of being relieved from its obligation in the event of the failure of the Local membership to ratify the agreement. **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, 123 N. L. R. B. 922, 929 (1959); cf., **N. L. R. B. v. Winchester Electronics, Incorporated**, 295 F. 2d 288 (2d Cir. 1961) (attempted employer repudiation after negotiation but prior to signing). The fact that contract remained to be ratified on July 16 would not allow the International to repudiate it for any reason other than the failure of the Local to approve it. **Operating Engineers, Local 3, A. F. L.-C. I. O. (California Assn. of Employers)**, *supra*; **The Texas Company**, 112 N. L. R. B.

169 (1955); **McLeod v. Local 27, Paper Products Chauffeurs, I. B. T.**, 212 F. Supp. 57 (E. D. N. Y. 1962); cf., **North Country Motors, Ltd.**, 146 N. L. R. B. No. 82, 55 L. R. R. M. 1421 (1964).

The agreement was ratified by the overwhelming majority of the Local and was signed by the local union officials and the Company on July 18, 1963 (R. 79, 91, 94, 109, 114-120, 221). It is obvious that, the Trial Examiner notwithstanding, the International was in no position to "reassert" its bargaining authority on August 1. The contract had been signed and was irrevocably binding on all parties.

For all of these reasons, the Trial Examiner and the Board erred in holding that the Local did not have actual authority and apparent authority and that such authority, if it existed, was revoked in time to render the July 18 agreement ineffective. Since there was a binding contract between the parties, the Board erred in finding the Employer guilty of a refusal to bargain in good faith. The Board's order should be set aside.

2. *Extracts From Petitioner's Reply Brief Filed in the Court of Appeals on May 7, 1965, Showing That the First Question Presented Was Argued to That Court.*

[1] I. **TWO FUNDAMENTAL MISCONCEPTIONS UNDERLIE THE BOARD'S BRIEF.**

* * * * * * * *

[3] B. **The Company and the Local Had Reached Agreement Prior to April 16, 1963, Subject Only to Ratification by the Members of the Local.**

In its Brief the Company repeatedly pointed out that tentative agreement was reached between the Company and the Local officers at the conclusion of the negotiations on July 13 and prior to the receipt of the July 16 telegram; that all that then remained was ratification by

the members of the Local and execution of a contract document embodying the agreement (Pet. Br. 10, 48, 61-2, 63, 64, 65-6). The evidence clearly indicates that such was in fact the case (R. 127, 90-91, 102, 142, 207). Nevertheless, the Board proceeds as if there were merely an open, unaccepted Company offer on July 16. There is a major distinction between allowing the International to revoke bargaining authority during negotiations and allowing it to repudiate an agreement duly negotiated by its agents [4] when all that remains is the execution of the agreement so reached. The Company specifically excepted to the Trial Examiner's failure to make this distinction (Par. 3, R. 231). Yet the Board's Brief in this Court, like its Decision and Order, simply ignores these facts and this distinction (R. 233-4, NLRB Br. 4-5, 17-18, 19, 28). As the Company has pointed out, citing numerous authorities, no attempted repudiation or limitation on the Local's authority could be effective unless it was received prior to the agreement of the Local officers to accept the Company proposal when ratified by the membership (Pet. Br. 47-9, 58-9, 60, 65-6). The Board cites numerous cases to establish the proposition that it need not specifically discuss each piece of evidence bearing on a disputed issue of fact (NLRB Br. 23 n. 5). The Board's silence on this vital issue may not, however, be passed off as a mere failure to discuss all of the conflicting evidence on an issue determined by the Board. In its Brief, the Board's attempted distinction of **Sheetmetal Workers**, 120 NLRB 1678 (1958), gives some indication that the General Counsel believes that communications limiting the bargaining agents' authority are effective unless the agreement has been reduced to writing before notice of such limitations is received by the Company (NLRB Br. 22-3). But this Court cannot determine from the Board's Decision and Order whether the Board questioned the facts—that tentative agreement subject only to ratification had been reached—or the law—that such an agreement could law-

fully be repudiated. "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action. . . .'" **N. L. R. B. v. Metropolitan Life Ins. Co.,**— U. S. —, 13 L. ed. 2d 951, 955 (1965). The Board may not frustrate judicial review by hiding behind "unarticulated bases of decision." *Id.*, 13 L. ed. 2d at 954-5. The absense of Board findings with respect to the existence and legal significance of the verbal agreement is a fatal defect [5] in the Board's Decision and Order in this case. *Cf.*, **Textile Workers v. Darlington Manufacturing Company,** — U. S. —, 13 L. ed. 2d 827, 837 (1965).

> "The compelling conclusion is that the Board has failed to 'disclose the basis of its order' and to 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 197, 85 L. ed. 1271, 1284. . . ." **American Ship Building Co. v. N. L. R. B.,** — U. S. —, 13 L. ed. 855, 869 (1965) (concurring opinion), **N. L. R. B. v. Metropolitan Life Ins. Co.** *supra*, 13 L. ed. 2d at 955.

Under these circumstances the Board's order should not be enforced.

II. THE BOARD HAS GROSSLY DISTORTED THE FACTS.

* * * * * * *

[7] 4. The Board states:

> ". . . When the Union learned of the **pending** agreement, it informed the Company [by its July 16 telegram] that the Local had no authority to execute **such** a contract" (NLRB Br. 19) (Emphasis added).

As previously indicated on July 16 the agreement was no longer "pending"; it had been concluded subject only to ratification by the members of the Local and final execution (R. 127, 91, 102, 142, 207). Moreover, the telegram

merely referred to Section 85 which gives the International the power to disapprove only contracts calling for substandard wages and working conditions. Nothing in the telegram indicated to the Local or the Company that the International viewed the 1963 contract as substandard or that it objected to that contract for any other reason (R. 90). It was only on August 1, long after execution of the contract, that the International by letter indicated its disapproval of the 1963 contract "by reason of substandard provisions thereof" (R. 124-5).

• • • • • • • •

[13] IV. **THE COMPANY NEED NOT SHOW THE LOCAL HAD "UNLIMITED AUTHORITY."**

The Board argues that the Company must demonstrate that the Local had "unlimited authority" (NLRB Br. 7, 16, 17-18). The Board, however, fails to recognize that it is sufficient for the Company to show that the Local had authority or apparent authority to negotiate the 1963 contract and that such authority was neither revoked nor limitations on it communicated to the Company until after negotiations, which the International knew were in progress, were concluded and agreement reached. The Board's own cases support the Company in this position (NLRB Br. 7, 18). Thus, **N. L. R. B. v. Acme Mattress Co., Inc.**, 192 F. 2d 524, 527 (7th Cir. 1951), held the International responsible for the actions of a person held out by it as its negotiator where "[n]o limitation was communicated to the Company with respect to Cline's [the negotiator's] apparent authority to impart to the Com-
[14] pany the terms and conditions upon which the International would execute the contract . . .", and **N. L. R. B. v. I. B. T., Local 182**, 228 F. 2d 83, 84 (2d Cir. 1955) held the union responsible for the "implied authority" of an acting steward.

• • • • • • • •

APPENDIX D.

1. *Conflicting Opinion of the United States Court of Appeals for the Ninth Circuit on the Propriety of Paragraph 1 (b) of the Board's Order (353 F. 2d 667).*

National Labor Relations Board,
Petitioner,

v.

Golden State Bottling Company, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento,
Respondent.

No. 19803.

United States Court of Appeals,
Ninth Circuit.

Dec. 2, 1965.

Rehearing Denied Jan. 7, 1966.

Before Chambers and Koelsch, Circuit Judges, and Thompson, District Judge.

Thompson, District Judge:

Effective April 1, 1961, the union P. C. B. C. E., Inc., and Respondent, Golden State Bottling Company, Inc., entered into a collective bargaining agreement covering all non-supervisory employees at the Sacramento, California plant of Golden State Bottling Company, Inc. Membership in the union was limited to employees of Golden State and it was independently operated and controlled. The agreement contained a provision for annual termination on notice.[1]

[1] "This agreement shall be effective as of the 1st day of April, 1961, and shall continue in effect until the 31st day of March, 1962, and from year to year thereafter, unless terminated by either party giving written notice of termination to the other party not less than sixty days, nor more than 120 days, prior to the anniversary date of the contract."

It was renewed in writing on March 31, 1962 with a 12½ cents per hour increase in wages. In January, 1963, the union sent timely notice to Golden State demanding negotiations for a new contract.

Negotiations commenced early in March and bargaining continued to the end of the month. No agreement was reached and the negotiations were deadlocked. At the last union meeting, the employer's proposals were rejected by the union by a tie vote and the employees who rejected the contract signed cards to solicit the Teamsters Union as the bargaining agent. When the employees reported for work the morning of April 1, they were called together by Schilling, the General Manager of Golden State, and informed that they would not be permitted to work without a contract. He renewed his proposal, stating that it was his best and final offer, and requested the employees to accept it.

At this point, the union members, disagreeing among themselves about what to do, split into two groups. The smaller group of ten, led by Wagner and by Baker, who was actively promoting the Teamsters Union, and including all the union's duly elected officers, left the plant and milled around outside the gate. The remaining fourteen employees were once again given the company's final offer, told that they could not work without a contract, and informed that they could not hold meetings on company property. It was also suggested that there would have to be officers to sign the contract. These employees adjourned to an adjacent alley and one them conferred with the union attorney by telephone and received advice that they could hold a meeting and elect new officers. They agreed to accept the company offer and elected new officers who signed the contract for the union. The attorney's advice appears to have been in conflict with the union's Constitution and by-laws respecting notices of meetings, although

Baker's group was informed of what was going on by members who went back and forth between the two groups.

Of the ten employees who left the plant, all but Baker and Wagner returned to work the same day. Wagner returned to work the next day, April 2, and Baker returned to work on April 3. Thus, all employees eventually accepted the contract terms.

On August 16, 1963, Baker was fired, purportedly for having been caught taking unauthorized time off to purchase football tickets. There had been intervening conversations between Schilling and Baker in which it was suggested that Baker find work elsewhere and Schilling had stated that the March and April incidents had not been forgotten.

As a result of the foregoing, unfair labor practice charges were filed against Respondent. After a hearing and a decision by the trial examiner, the Board made the following findings and conclusions:

> "We find, as did the trial examiner, that the Respondent violated Section 8 (a) (3) and (1) of the Act by denying employment to Wagner on April 1, 1963, and to Baker on April 1 and 2, 1963, because they declined to sign the Respondent's contract proposal as officers of the incumbent union, P. C. B. C. E., Inc., hereinafter referred to as Union. We further find that the Respondent violated those Sections of the Act by discharging Baker on August 16 because of his said activity in April and his attempt to interest the employees in joining the International Brotherhood of Teamsters.
>
> "The Trial Examiner concluded that the Respondent, by its conduct on April 1 in conditioning continued employment of all its employees upon their acceptance of the Respondent's contract offer and

> forcing the employees to elect new officers to sign that contract, dominated the administration of the Union in violation of Section 8 (a) (2) and (1) of the Act. We agree that the Respondent thereby interfered with the administration of the Union in violation of Section 8 (a) (2) and (1) of the Act, but conclude that those acts did not constitute domination of that organization within the meaning of Section 8 (a) (2)."

The Board, in addition to ordering Respondent to withdraw recognition from the union temporarily and to reinstate Baker with back pay, and to reimburse Wagner for loss of one day's wages, ordered Respondent to cease and desist from (a) interfering with the administration of the union or any other labor organization; (b) recognizing anyone but the duly elected union bargaining agent for the purpose of collective bargaining; (c) bargaining with the union until it has been certified as exclusive representative by the National Labor Relations Board; (d) giving effect to the April 1 contract; and (e) discharging, witholding or threatening to withhold employment from any employee for the purpose of compelling him or his bargaining agent to yield to Respondent's contract proposals. The Board then instituted this action by filing a petition for enforcement of its Order.

We affirm the finding that Respondent violated Section 8 (a) (3) and (1) of the Act by firing Baker on August 16, 1963. There is, in the record considered as a whole, substantial evidence to support the Board's finding that Baker's discharge was motivated by his past union activities on behalf of the Teamsters. National Labor Relations Board v. Sellers (9 CCA 1965), 346 F. 2d 625.

The remaining findings of unfair labor practices stem substantially from the April 1 lockout by Golden State. In American Ship Building Company v. National Labor Relations Board, 380 U. S. 300, 85 S. Ct. 955, 13 L. Ed.

2d 855 (1965), decided after the Board's decision here, the Supreme Court held that a lockout by an employer used as a means of bringing pressure on his employees in support of his bargaining position does not violate Section 8 (a) (3) and (1) unless there exists a supportable finding of unlawful intent on the part of the employer to injure a labor organization or to evade his duty to bargain collectively, or to discourage union membership.

We do not think that the rationale of the American Ship Building case is inapplicable merely because of the charges here under Section 8 (a) (2), proscribing employer domination and interference with union administration, which were not present in that case. True, the effect of this lockout was to disrupt the orderly internal functioning of the union, but this result of an otherwise lawful act cannot make that act an unfair labor practice. This was not a necessary consequence of the lockout and the employer's refusal of work did not necessarily destroy the union's capacity for effective and responsible representation.

The Board's characterization of the events of April 1, 1963 as interference with the administration of the union is based on the fact that the union split into two factions and that one of these factions promptly backed away from the union's earlier position and decided to accept the company's proposal. This seems to us to be simply a possible result of a legal lockout. In the absence of evidence that the employer was wrongfully motivated in the exercise of his right to refuse work or that union disruption was a necessary consequence thereof, we cannot sustain the view that the lockout was an unfair labor practice.

The Board found violations of Section 8 (a) (1) and (3) in the denial of work to Wagner and Baker on April 1 and 2 because they refused to sign the contract as officers of the union. There is no evidence to support this finding.

Denial of work to Wagner and Baker was merely part of the general lockout and they were treated no differently than other employees.

The Board also found violations of Section 8 (a) (1) and (2) in that the company conditioned continued employment on the employees' acceptance of the contract and "forced" them to elect new officers to sign the contract. To repeat, the conditioning of all work upon acceptance of the contract is the very essence of a lockout which, as a matter of law, cannot be an unfair labor practice without a finding of proscribed intent or necessary destruction of the union's capacity for responsible and effective representation. There is no such finding here, nor could one be made on this record. There was testimony, accepted by the Board, that Schilling told the union majority to hold an election of new officers so that there would be someone to sign the contract. This falls short of forcing an election since the men were out of the company plant on their own before the election was held and sought and received the advice of their own attorney.

It was, nevertheless, inappropriate in these circumstances for Schilling, with full knowledge of the union split, to tell one of the groups what to do, and to this extent, the record sustains the Board's finding that he interfered with the administration of the union. Schilling sought the bargaining benefits of a lockout but was unwilling to assume the burdens. His whole course of conduct on April 1 demonstrates an unwillingness for the plant to be shut down and an avid desire to do anything to keep it operating despite the proclaimed lockout. The legal course open to him was to hire temporary replacements for the locked out employees. Labor Board v. Brown, 1965, 380 U. S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839. His duty was to leave the union alone to work out its own destiny. It was an unfair labor practice for him to bargain with the remaining employees, none of whom, by

chance, was a member of the authorized bargaining committee for the union, and his suggestion that new officers be elected, while clearly an interference with the administration of the union under the circumstances of economic compulsion inherent in the lockout, serves also to aggravate the impropriety of his dealing at all with a splinter group.

One paragraph of the Board's Order which we will not enforce deserves special comment. Paragraph 1 (d) enjoins the company from:

> "Performing, enforcing, or giving effect to the contract with P. C. B. C. E., Inc., dated April 1, 1963, or any supplement or renewal thereof; **Provided, however,** that nothing herein shall be construed to require the Respondent to vary any substantive provision of such agreement, or to prejudice the assertion by the employees of any rights they have thereunder."

We fail to see how the company can cease and desist from performing or enforcing the contract while at the same time allowing the assertion of employee rights thereunder. We refuse to direct such one-sided enforcement.

The Board's Order is enforced in conformity with this opinion.

2. *Extract From the Board's Petition for Rehearing in NLRB v. Golden State Bottling Company (Denied January 7, 1966) Relating to the Propriety of the Board's Order.*

[4] 3. The portion of the Board's order dealing with the contract between the Company and the Independent Union (Paragraph 1 (d)) is intended to permit the Company to maintain working conditions now in effect while prohibiting it from treating them as contractually imposed. The purpose of this provision, which was not

challenged by the Company (**Marshall Field & Co. v. N. L. R. B.**, 318 U. S. 253), is to effectuate the withdrawal of recognition from the Independent Union, for an appropriate time, without compelling the Company to withdraw benefits in the name of compliance with the Board's order. See, **National Licorice Co. v. N. L. R. B.**, 309 U. S. 350, 365; **J. I. Case v. N. L. R. B.**, 321 U. S. 332, 340-342; **I. L. G. W. U. v. N. L. R. B.**, 366 U. S. 731, 735, n. 7; **N. L. R. B. v. Wemyss**, 212 F. 2d 465, 472, 473-474 (C. A. 9); **Independent Stave Co., Inc. v. N. L. R. B.**, ... F. 2d ... (C. A. 8), November 10, 1965, 60 LRRM 2406, 2413, 52 L. C. Para. 16, 729. If, as the Court found (slip op., p. 6), paragraph 1 (d) of the Board's order is ambiguous, we submit that the Court should have remanded that portion of the order to the Board for clarification, instead of denying enforcement and thereby permitting respondent to continue to maintain a contract which the Court found was obtained through unlawful means.